DATO' SERI ANWAR IBRAHIM

v.

PP

COURT OF APPEAL, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
NH CHAN JCA
AHMAD FAIRUZ JCA
[CRIMINAL APPEAL NO: W-05-66-1998]
16 JANUARY 1999

CRIMINAL PROCEDURE: *Bail - Bail pendente lite - High Court refusing bail pendente lite - Whether decision appealable to Court of Appeal - Whether decision finally determined the rights of the parties - Criminal Procedure Code ss. 2(i), 294, 388, 389 - Courts of Judicature Act 1964, ss. 3, 50*

CRIMINAL PROCEDURE: *Bail - Bail pendente lite - Refusing bail on ground that accused would tamper with evidence - Principles - Whether there must be material on record to indicate possibility of alleged tampering*

STATUTORY INTERPRETATION: *Construction of statutes - Courts of Judicature Act 1964, s. 3 - Meaning of "decision" thereof - Whether means only final decision*

The appellant was charged with several non-bailable offences and had applied for bail *pendente lite*. The learned judge, upon consideration *inter alia* of certain police reports produced by the prosecution, ruled that the appellant, if released, might tamper with the evidence of the prosecution witnesses and so refused bail. The appellant appealed and argued that bail was wrongly refused as there was nothing to substantiate the apprehension expressed by the learned judge. The appellant apparently admitted that the present appeal, by virtue of the meaning accorded to the word "decision" in s. 3 of the Courts of Judicature Act 1964 ('the CJA'), ought to be confined to "decisions which had finally disposed of the rights of the parties", but argued that the appeal was properly before the appellate court, as s. 3 CJA had excluded any ruling on matters extraneous to the issues in the main action and a bail application is one such extraneous matter. The primary issue that arose was whether the decision not to give bail herein was a decision that had the effect of finally disposing the rights of the parties, and was therefore appealable to the Court of Appeal.

Held:

Per Lamin Mohd Yunus PCA

[1] Bail under s. 388 Criminal Procedure Code is granted at the complete discretion of the court. Thus, to get bail is not as of right.

[2] The matter of bail may very well be extraneous to the issues to be determined in the main case. But that is not the issue. What are appealable, as is intended by the current definition of the word "decision", are those decisions of the High Court that have the effect of finally disposing of the rights of parties.

[3] The very nature of bail possesses no element of finality and is something of a respite. Once given it is capable of being withdrawn and upon refusal it can be reapplied. That being so, this court is unable to accept the interpretation as submitted by the appellant. It is quite clear that the matter of bail is incompetent to be laid before this court.

Obiter

[1] The tremendous noise caused by shouts is heard everyday of the trial particularly when the court adjourns for the day and the appellant is making his exit from this building. Such noises constitute a breach of the peace. This sort of situation must be treated as another factor to be considered by any court as a ground for refusing bail.

Per NH Chan JCA:

[1] There is no right of appeal at law from a decision of a court to any other court unless there is a statutory provision which gives a right to appeal.

[1a] There is no provision in the Criminal Procedure Code or in the current version of the CJA (ie, after the amendment to s. 3 on the meaning of "decision" by Amendment Act A1031) which gives a right of appeal from an order of the High Court granting or refusing to grant bail. Section 50 of the CJA provides for criminal appeals from any decision of the High Court to the Court of Appeal but those appeals, since the amendment to s. 3 ('the 1998 amendment'), are now to be confined to decisions which would have the effect of finally disposing of the rights of the parties. The 1998 amendment, thus, excludes the type of judgments and orders which are termed as "interlocutory".

[2] What the 1998 amendment means is that, a judgment or order which does not deal with the final rights of the parties, but is made *pendente lite*, and gives no final decision on the matters in dispute, is not a "decision" within the meaning of that word in the current version of s. 3 CJA, and therefore is not appealable. It makes no difference that such a judgment or order is final, that is to say conclusive, as to the subordinate matter with which it deals.

[3] The grant or refusal of bail is a ruling made in the course of a trial or hearing of any cause or matter which does not finally determine the rights of the parties. The grant or refusal of bail is therefore not a "decision" within the meaning of that word in s. 3 of the CJA. That being so, the order of the High Court in refusing to admit the appellant to bail is not appealable to the Court of Appeal.

Obiter:

[1] It is regrettable that the judge below had to resort to a fifty year old edition of *Sohoni's Code of Criminal Procedure*, in coming to the conclusion that "any allegation that the accused is tampering with witnesses would be a cogent reason for refusing bail". That textbook had since revised its views, and it is now clear that where allegations are made that the accused might abscond or tamper with evidence or the like, bail will not be refused merely on the basis of vague allegations. There must be material on record which may give indication of such a possibility.

[2] In this case, the court below was informed by the tendering of some police reports in court. We are unable to see if those police reports contained merely vague and general allegations. Since we could not express any opinion on the sufficiency of those police reports, we cannot say that the judge had acted improperly when he refused to grant bail. In any case, there is a presumption that the judge has rightly exercised his discretion, and an appellate court will also not ordinarily interfere with the discretion exercised by a lower court on a matter relating to bail.

[3] Since, as of 31 July 1998, no appeal lies to the Court of Appeal from a decision of the High Court on a bail application, everything will now have to depend on the judicial conscience of a single judge of the High Court who is to exercise his discretion not in opposition to but in accordance with established principles of law. But, what is there to stop a renegade judge from knowingly misusing his discretion by exercising it in opposition to established principles of law. Sadly, there is nothing that can be done under the law to correct such miscarriage of justice.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu telah dituduh dengan beberapa kesalahan tak boleh jamin dan telah memohon jaminan sewaktu perbicaraannya sedang berjalan. Hakim yang bijaksana, setelah mempertimbangkan antara lainnya beberapa laporan polis yang dikemukakan pihak pendakwa, menyimpulkan bahawa perayu, jika dibebaskan, berkemungkinan akan mengusik keterangan saksi-saksi pendakwa dan dengan itu menolak jaminan. Perayu merayu dan berhujah bahawa adalah silap untuk tidak membenarkan jaminan kerana tidak terdapat sesuatu pun yang menyokong kekhuatiran yang disuarakan oleh hakim yang bijaksana. Perayu kelihatannya mengakui bahawa rayuan semasa, berikut takrif yang diberikan kepada perkataan "decision" dalam s. 3 Akta Mahkamah Kehakiman 1964 ('AMK'), harus dikhususkan kepada "decisions which had finally disposed the rights of the parties", tetapi menghujah bahawa rayuannya telah dikemukakan dengan teratur ke Mahkamah Rayuan, oleh kerana s. 3 AMK tidak merangkumi mana-mana perintah yang berkaitan dengan perkara-perkara 'extraneous' kepada isu-isu pokok tindakan sepertimana halnya dengan permohonan jaminannya di sini. Persoalan penting yang timbul ialah samada keputusan untuk tidak membenarkan jaminan di sini merupakan suatu keputusan yang secara berkesannya telah "finally disposing of the rights of the parties", dan dengan itu menjadi halperkara yang boleh dirayu ke Mahkamah Rayuan.

Diputuskan:
Oleh Lamin Mohd Yunus PMR

[1] Jaminan di bawah s. 388 Kanun Prosedur Jenayah adalah dibenarkan mengikut budi bicara mutlak mahkamah. Maka itu jaminan bukanlah merupakan suatu hak.

[2] Halperkara jaminan mungkin merupakan halperkara 'extraneous' kepada isu-isu yang perlu diputuskan dalam kes pokok. Tetapi itu bukan isunya. Apa yang boleh dirayu, sebagaimana yang dituntut oleh takrif semasa perkataan "decision", adalah keputusan-keputusan Mahkamah Tinggi yang secara berkesannya telah "finally disposing of the rights of the parties".

[3] Sifat jaminan itu sendiri tidak mengandungi elemen kemuktamadan dan memang bersifat sementara. Apabila dibenarkan ia boleh dibatalkan dan jika ditolak ia boleh dimohon semula. Dengan kedudukan sedemikian, mahkamah ini tidak dapat menerima pentafsiran seperti yang dikemukakan oleh perayu. Agak jelas bahawa halperkara jaminan tidak berkompeten untuk dibentang di mahkamah ini.

Obiter

[1] Kebisingan melampau yang disebabkan oleh laungan-laungan terdengar setiap hari sewaktu perbicaraan berjalan terutama sekali apabila mahkamah menangguh sidang dan perayu keluar dari bangunan ini. Kebisingan sedemikian adalah satu pecah keamanan. Keadaan sebegini harus dianggap sebagai satu lagi faktor yang perlu dipertimbang oleh mana-mana mahkamah sebagai alasan untuk menolak jaminan.

Oleh NH Chan HMR

[1] Di sisi undang-undang, tidak wujud hak untuk merayu dari satu mahkamah ke mahkamah yang lain kecuali terdapat peruntukan statut yang membenarkan hak merayu sedemikian.

[1a] Tidak ada peruntukan di dalam Kanun Prosedur Jenayah atau di dalam versi semasa AMK (iaitu selepas pindaan kepada s. 3 oleh Akta Pindaan A 1031 berhubung maksud "decision") yang memberi hak untuk merayu dari suatu perintah Mahkamah Tinggi yang membenarkan atau menolak jaminan. Seksyen 50 AMK memang membuat peruntukan bagi rayuan-rayuan jenayah dari keputusan Mahkamah Tinggi ke Mahkamah Rayuan tetapi rayuan-rayuan tersebut, selepas pindaan kepada s. 3 ('pindaan 1998'), perlu dikhususkan kepada "decisions which would have the effect of finally disposing of the rights of the parties". Pindaan 1998, dengan itu, mengetepikan penghakiman dan perintah yang berjenis "interlokutori".

[2] Pindaan 1998 memberi maksud bahawa sesuatu penghakiman atau perintah yang tidak menyentuh hak-hak muktamad pihak-pihak, tetapi dibuat *pendente lite*, dan tidak memutuskan secara muktamad hal-hal perkara yang dipertikaikan, bukanlah satu "decision" dalam ertikata takrif perkataan tersebut seperti yang terdapat dalam versi semasa s. 3 AMK, dan ianya dengan itu tidak boleh dirayu. Keadaan ini tidak berubah walaupun penghakiman atau perintah tersebut adalah muktamad, yakni konklusif, berhubung halperkara sampingan yang disentuh olehnya.

[3] Membenarkan atau menolak jaminan adalah satu perintah yang dibuat semasa perbicaraan sesuatu kausa atau halperkara yang samasekali tidak memutuskan dengan muktamadnya "the rights of the parties". Pembenaran atau penolakan jaminan dengan itu bukanlah satu "decision" dalam ertikata dan maksud perkataan tersebut dalam s. 3 AKM. Oleh hal yang demikian, perintah Mahkamah Tinggi yang enggan membenarkan jaminan kepada perayu tidaklah boleh dirayu kepada Mahkamah Rayuan.

Obiter:

[1] Adalah dikesalkan bahawa hakim di bawah terpaksa merujuk kepada edisi *Sohoni's Code of Criminal Procedure* yang sudah berumur lima puluh tahun, dalam mencapai keputusannya bahawa "apa-apa pengataan bahawa tertuduh mengusik saksi-saksi adalah alasan yang kuat untuk menolak jaminan". Buku teks tersebut telah pun mengkaji semula pandangannya, dan ianya kini jelas bahawa di mana tertuduh dikatakan akan melarikan diri atau mengusik keterangan atau membuat perkara-perkara seumpamanya, jaminan tidak boleh ditolak atas pengataan-pengataan yang samar. Hendaklah ada material di atas rekod yang menunjukkan apa yang dituduh itu mungkin berlaku.

[2] Dalam kes ini, mahkamah di bawah telah diberitahu melalui pengemukaan laporan-laporan polis di mahkamah. Kami tidak dapat melihat samada laporan-laporan polis tersebut mengandungi semata-mata tuduhan-tuduhan samar dan umum. Oleh kerana kami tidak dapat menyuarakan apa-apa pandangan berhubung kecukupan laporan-laporan polis tersebut, kami tidak dapat mengatakan bahawa hakim telah bertindak secara tidak teratur ketika menolak jaminan. Walau apa pun, terdapat anggapan bahawa hakim telah melaksanakan budi bicaranya dengan betul, dan Mahkamah Rayuan juga pada kebiasaannya tidak akan mencampuri urusan pelaksanaan budibicara oleh mahkamah di bawah dalam hal yang berkaitan dengan jaminan.

[3] Oleh kerana, sejak 31 Julai 1998, tiada rayuan boleh dikemukakan ke Mahkamah Rayuan dari suatu keputusan Mahkamah Tinggi berkaitan satu permohonan jaminan, segala-galanya kini bergantung kepada suarahati kehakiman seorang hakim tunggal Mahkamah Tinggi yang seharusnya melaksanakan budibicaranya selaras, dan tidak bertentangan, dengan prinsip undang-undang yang sudah lama terpakai. Tetapi, apakah yang boleh menghalang seorang hakim khianat dari menyalahguna budibicaranya secara sedar dengan melaksanakannya secara yang bertentangan dengan 'established principles of law'. Adalah menyedihkan bahawa tiada apa yang boleh dibuat di sisi undang-undang bagi membetulkan salah laksana keadilan yang sedemikian itu.

[Rayuan ditolak.]

Cases referred to:

A-G v. Sillem [1864] 10 HLC 704 ***(refd)***

Ang Gin Lee v. PP [1991] 1 MLJ 498 ***(refd)***

Babu Singh v. State AIR [1978] SC 527 ***(refd)***

Bihar Legal Support Society, New Delhi v. Chief Justice of India AIR [1987] SC 38 ***(refd)***

Charles Osenton & Co v. Johnston [1942] AC 130 ***(refd)***
Emperor v. Abhairaj Kunwar AIR [1940] Oudh 8 ***(refd)***
Evans v. Bartlam [1937] AC 473 ***(refd)***
Guru v. Emperor AIR [1930] Bombay 484 ***(refd)***
Ingley & Ors v. Emperor AIR [1944] Nagpur 149 ***(refd)***
Maleb Su v. PP [1984] 1 MLJ 311 ***(refd)***
Mokhtar Hashim v. PP [1983] 2 MLJ 232 ***(cit)***
Paras Ram v. The State AIR [1951] Himachal Pradesh 13 ***(refd)***
PP v. Chew Siew Luan [1982] 1 CLJ 354 ***(cit)***
PP v. Dato' Mat [1991] 2 CLJ 1112 ***(cit)***
PP v. Dato' Seri Anwar Ibrahim [1998] 4 MLJ 481 ***(cit)***
PP v. Leong Ying Ming [1993] 2 CLJ 143 ***(cit)***
PP v. Wee Swee Siang [1948] MLJ 114 ***(refd)***
PP v. Zulkifflee Hassan [1990] 2 CLJ 1 ***(cit)***
R v. West Kent Quarter Sessions Appeal Committee [1951] 2 All ER 728 ***(refd)***
Ratnam v. Cumarasamy [1965] MLJ 228 ***(refd)***
Re KS Menon [1946] MLJ 49 ***(cit)***
Re Reed [1979] 2 All ER 22 ***(refd)***
Saad Abas & Anor v. PP [1998] 4 CLJ 575 ***(refd)***
Subbarama Iyer v. State AIR [1953] Travancore-Cochin 25 ***(refd)***
Sulaiman Kadir v. PP [1976] 2 MLJ 37 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 50
Criminal Procedure Code, ss. 2(i), 387, 388(i), 389, 394
Constitution of India, art. 136(1)

Other sources referred to:
Bail in Singapore, S Chandra Mohan, p 86
Bail, Law and Practice, MR Mallick, (1990), pp 187, 188
Halsbury's Laws of England, 4th edn, vol 26, paras 505, 506, pp 238, 240
Iyer's Law of Bails, (1988), 4th edn, p 254
Malaysian Law On Bail, Mimi Kamariah Majid & Lee Oi Kuan, (1986), pp 36, 72
Sohoni's The Code of Criminal Procedure, (1997), 19th edn, p 4795
What Next in the Law, Lord Denning, p 330

For the appellant - Raja Aziz Addruse (Christopher Fernando, Gurbachan Singh Pannu, Sankara Nair, Zulkifli Nordin, Robyn Choi & Pawanchek Marican with him) M/s SN Nair & Partners
For the respondent - Dato' Abdul Gani Patail (Azahar Mohamed & Mohd Yusof Hj Zainal Abiden with him)

[Appeal from High Court, Kuala Lumpur; Criminal Appeal Nos: 45-47-98, 45-48-98, 45-49-98, 45-50-98, 45-51-98, 45-52-98, 45-53-98, 45-54-98]

Reported by WA Sharif

JUDGMENT

Lamin Mohd Yunus PCA:

My learned brother NH Chan, JCA will now deliver the judgment of the court.

This court, as you have just heard, has no jurisdiction to entertain an appeal on the subject of bail.

However if I may add one other point. Raja Aziz Addruse, one of the learned counsels for the appellant (the accused below) submitted that the definition of the word "decision" in s. 3 as amended would appear to exclude a ruling on any matter extraneous to the disposal of issues in the main action. He said that a bail application would be such a matter. A matter of bail is determined in the light of whether it is a bailable offence (s. 387 CPC) or a non-bailable offence (s. 388 CPC). The Criminal Procedure Code defines what is a "bailable offence" and what is a "non-bailable offence." Clearly therefore it must relate to the charge with which an accused person is preferred. The purpose of a criminal trial is to dispose of the case in respect of the charge. The question of bail cannot be said to be unrelated to the trial. A non-bailable offence is indicated in the first schedule of the Criminal Procedure Code as being an offence against which the words "not bailable" appear. At first blush the words "non-bailable offence" or "not bailable offence" suggest that when a person is charged with a non-bailable offence he is not to have his freedom until he is freed of the charge because he has been accused of having committed a serious offence. However the court is given a complete discretion to decide whether to allow bail or not (s. 388 CPC). A court has to consider various interests such as those of the state, the public, the accused, the prosecution and the court before it can exercise its judicial discretion whether to grant bail or not. The issue before us is whether the matter of bail is appealable to the Court of Appeal. The Courts of Judicature Act 1964 spells out the areas of jurisdiction for the Court of Appeal both criminal and civil. Its criminal jurisdiction is found within the terms of s. 50 of the Act. Section 50 employs the word "decision" with its definition provided for in s. 3. As it has been suggested the definition of the word "decision" would exclude any ruling on any matter extraneous to the issues to be determined in the main case. This, as I understand it, would mean any decision of the High Court on any matter would be appealable to the Court of Appeal. That cannot be the intention of Parliament. The matter of bail may very well be extraneous to the issues to be determined in the main case. But that is not the issue. What are appealable, as is intended by the current definition of the word "decision" are those decisions of the High Court that have the effect of finally disposing of the

rights of parties. To get bail is not as of right. Bail under s. 388 of the Criminal Procedure Code is granted at the complete discretion of the court.

The very nature of bail possesses no element of finality. It is something of a respite. It is a mechanism for temporary relief from confinement. Once given it is capable of being withdrawn. Upon refusal it can be reapplied. With the greatest of respect I am unable to accept the interpretation as submitted by the learned counsel for the appellant. I am therefore quite clear in my own mind that an appeal on the matter of bail is incompetent to be laid before this court and therefore is rightly dismissed. With that, the proceedings of this morning should end.

However with the happenings around this court building where the trial involving the appellant also takes place, I feel compelled to make an observation. Tremendous noise caused by shouts is heard every day of the trial particularly at the time when the court adjourns for the day and the appellant is making his exit from this building. This has become public knowledge. I consider such noises constitute a breach of the peace. I can well imagine the kind of situation that can prevail if the appellant is free to move about when the trial is not in session, the police will have no option but to deploy extra manpower more than what you can see around the court building since the commencement of the trial, of course at the expense of public fund in order to maintain peace and order. To my mind this sort of situation must be treated as another factor to be considered by any court as a ground for refusing bail.

NH Chan JCA:

This appeal concerns the refusal of the High Court to grant bail *pendente lite* to the appellant (*PP v. Dato' Seri Anwar bin Ibrahim* [1998] 4 MLJ 481). The trial in the High Court is at present continuing and will go on, so it appears, for some considerable time still to come considering that it is making progress at a snail's pace.

All the offences for which the appellant has been charged are non-bailable offences. Section 388(i) of the Criminal Procedure Code provides for the granting of bail in non-bailable offences. It says:

> 388(i) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the officer in charge of the police district or by such Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:
>
> Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

Even though s. 388(i) refers to non-bailable offences, bail is not to be refused just because the offence is said to be non-bailable. "... the term 'non-bailable' is not equivalent to the term 'unbailable' which means bail is absolutely prohibited. In the CPC, s. 388 provides for the grant or refusal of bail in non-bailable offences." (*Malaysian Law On Bail:* Mimi Kamariah Majid and Lee Oi Kuan [1986], at p. 36).

"If bail is refused by the subordinate court the accused can appeal to the High Court under s. 394 of the CPC or the accused can apply to the High Court to exercise its discretion under s. 389 of the CPC and admit the accused to bail." (*Malaysian Law On Bail, supra,* at p. 72). Section 394 of the Criminal Procedure Code reads:

> 394. Any person aggrieved by any order or refusal of any inferior Court made under this Chapter may appeal to the High Court, which may confirm, vary or reverse the order of such inferior Court.

And the material part of s. 389 of the Code reads:

> ...; and a judge may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or Court be reduced or increased.

And "Court" here in s. 389 of the Code means (see s. 2(i)):

> 2(i) In this Code:
>
> ...
>
> "Court" means the High Court, a Sessions Court, or the Court of a Magistrate of any class, as the context may require;

Of course, any practitioner at the criminal Bar, who is worth his salt, invariably would apply to the High Court under s. 389 for bail if it was refused by a subordinate court. It would not be practicable to appeal under s. 394 as an appeal could take a much longer time before it could be heard. That is why, the appeal procedure (under s. 394) was hardly, if ever, used by experienced counsel at the criminal Bar. See *Sulaiman bin Kadir v. PP* [1976] 2 MLJ 37 where Harun J (as he was then) said:

> This is an application for bail pending appeal (to the High Court). ...
>
> ... The learned deputy public prosecutor has raised the issue whether this application is properly before this court. He contends that the application is in effect an appeal from the refusal of the learned president to grant bail and that therefore these proceedings should be brought by Notice of Appeal under section 394 of the Criminal Procedure Code which reads:

> Any person aggrieved by any order or refusal of any inferior court made under this chapter may appeal to the High Court, which may confirm, vary or reverse the order of such inferior court.

The present application is by Notice of Motion under section 389 of the Criminal Procedure Code which reads:

> The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested, but shall not be excessive; and a judge may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or court be reduced or increased.

The difference between the two procedures is simply this: If it is an appeal, it will take a longer time to be heard because there has to be a Notice of Appeal and the Subordinate Court will have to state its reasons for refusal before the Petition of Appeal can be filed and eventually heard but if it is an application by Notice of Motion supported by affidavit, it can be made immediately after refusal without notice to the Subordinate Court (but with Notice to the Public Prosecutor) and the application can even be heard by the High Court on the same day or very soon thereafter, speed being the essence of such an application.

There does not appear to be any authority as to which is the proper course to take in such cases. In my view, if a person should not be kept in custody for a moment longer than is necessary then the speedy procedure of section 389 is obviously indicated. But there are other compelling reasons why section 389 is the appropriate procedure. That section gives the High Court absolute discretionary powers to vary bail from time of arrest right up to the time of conviction. It may grant bail when bail has been refused. It may reduce the amount of bail if the amount is excessive. It may increase the amount of bail if the amount is insufficient. But it may not order custody if bail has been granted. The appeal provisions of section 394 of the Criminal Procedure Code, on the other hand, are intended to deal with matters not provided for under section 389 of the Criminal Procedure Code, for instance, if an accused person had been admitted to bail by a Subordinate Court contrary to section 388(i) of the Criminal Procedure Code. As this application arises out of a refusal to grant bail, the provisions of section 389 apply and I accordingly hold that it is properly before this court.

But, can there be an appeal from the High Court to the Court of Appeal if bail was refused by a judge of the High Court, as in this case. As said by Lord Goddard CJ in *R v. West Kent Quarter Sessions Appeal Committee* [1951] 2 All ER 728, at 730:

> It is most elementary that no appeal from a court lies to any other court unless there is a statutory provision which gives a right to appeal. The decision of every court is final if it has jurisdiction, unless an appeal is given by statute.

a See also *Attorney-General v. Sillem* [1864] 10 HLC 704 where the House of Lords held that the creation of a right of appeal is an act which requires legislative authority: see by Lord Westbury LC at 719.

There is no right of appeal at law from a decision of a court to any other court unless there is a statutory provision which gives a right to appeal. The b creation of a right of appeal is an act which requires legislative authority. The right to appeal from one court to another must be conferred by some statute, otherwise, the decision of every court of law is final. There is no provision in the Criminal Procedure Code or in the current version of the Courts of Judicature Act 1964 (that is, after the amendment to s. 3 on the meaning of c "decision" in 1998 by Amendment Act A 1031) which gives a right of appeal from an order of the High Court granting or refusing to grant bail. Section 50 of the Courts of Judicature Act provides for criminal appeals from any decision of the High Court to the Court of Appeal but those appeals (since the amendment to s. 3 in 1998) are now to be confined only to decisions d which would have the effect of finally disposing of the rights of the parties. Section 50 of the Act reads as follows:

> 50(1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:
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> e
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> (a) in the exercise of its original jurisdiction; and
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> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.
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> f (2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.

g And s. 3 now gives the meaning of "decision" as:

> 3. In this Act, unless the context otherwise requires:
>
> ...
>
> h "decision" means judgment, sentence or order, [but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties]; *(We have supplied the square brackets)*

The words which we have bracketed were added by Amendment Act A 1031 i of 1998 which came into force on 31 July 1998.

This new definition of "decision", as in the amendment, does not include a judgment or order which does not deal with the final rights of the parties on the matters in dispute. In other words, what has been excluded from the meaning of the word "decision" is the type of judgments and orders which is termed "interlocutory" by *Halsbury's Laws of England*, 4th Edn, Vol. 26, para. 506, at p. 240, which reads:

> 506. Interlocutory judgments and orders. An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'.
>
> An interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.

Shortly stated, what the amendment means is that a judgment or order which does not deal with the final rights of the parties, but is made *pendente lite*, and gives no final decision on the matters in dispute, is not a "decision" within the meaning of that word in the current version of s. 3 Courts of Judicature Act, and therefore is not appealable. It makes no difference that such a judgment or order is final, that is to say conclusive, as to the subordinate matter with which it deals. For instance, an order granting or refusing bail is final (conclusive) as to the application with which it deals but it is still an order which does not deal with the final rights of the parties. Such an order is made before judgment or sentence and gives no final decision on the matters in dispute. A judgment or order, even though not conclusive (final) of the main dispute, may be conclusive (final) as to the subordinate matter with which it deals. In this way, an interlocutory judgment or order may be conclusive (final) as to the subordinate matter with which it deals even though it is not conclusive (final) of the main dispute.

The real distinction is between, (for want of a better word) what is called, final judgments and orders and interlocutory judgments and orders. In general a judgment or order which determines the principal matter in question is termed "final": see 26 *Halsbury's Laws of England, supra*, para. 505, p. 238. Actually, the use of the term "final" is tautological as all judgments and orders are final. The term ("final") is used for the purpose of distinguishing between judgments and orders and "interlocutory" judgments and orders. The difference is that judgments and orders which are not termed "interlocutory" judgments and orders are appealable under the new meaning of the word "decision" as defined in s. 3 by the 1998 amendment. In other words, judgments and orders which determine the principal matter in question are termed "final" judgments

and orders, and they are appealable. But, those judgments and orders which give no final decision on the matters in dispute (which are termed "interlocutory" judgments and orders) are now no longer appealable.

Previously, the words on the meaning of "decision" (in s. 3) read:

> 'decision' includes judgment, sentence or order;

It is wrong to hold (as held in the High Court case of *Maleb bin Su v. PP* [1984] 1 MLJ 311) that the above words mean a decision which would "finally dispose of the rights of the accused persons." That would be adding words which are not there to a statutory provision. (*Maleb* was approved *obiter* in *Ang Gin Lee v. PP* [1991] 1 MLJ 498, SC where Hashim Yeop A. Sani CJ said, at 500:

> There is no doubt in the present case that the order has a final effect and disposes of the right of the applicant. But that is not the end of the matter. To satisfy s. 307(i) of the Criminal Procedure Code it is also necessary to answer the equally crucial question – was the order made in a criminal case or matter?

Since the order in question in *Ang Gin Lee* "has a final effect and disposes of the right[s] of the applicant", it was not necessary to the decision in *Ang* to apply *Maleb* which was a decision that extended the meaning of the words "judgment, sentence or order" to mean a judgment or order which would finally dispose of the rights of the parties.)

These words "judgment, sentence or order" are almost similar in phraseology to that of art. 136(1) of the Constitution of India which provides for the granting of special leave to appeal to the Supreme Court of India from any "**judgment,** decree, determination, **sentence** or **order**" passed or made by any court in India. Article 136(1) reads:

> 136.(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any **judgment,** decree, determination, **sentence or order** in any case or matter passed or made by any court or tribunal in the territory of India. (Our emphasis)

Previous to the 1998 amendment, in this country, there was always a right of appeal from orders of the High Court on bail matters to the former Federal Court, the then Supreme Court and a *fortiori* by succession the present Court of Appeal (see *PP v. Chew Siew Luan* [1982] 1 CLJ 354; [1982] 2 MLJ 119, FC, *PP v. Zulkifflee bin Hassan* [1990] 2 CLJ 1; [1990] 2 MLJ 215, SC, *PP v. Dato' Mat* [1991] 2 CLJ 1112; [1991] 2 MLJ 186, SC and *PP v. Leong Ying Ming* [1993] 2 CLJ 143; [1993] 1 MLJ 177, SC). But, in India appeals on bail matters to the Supreme Court of India are by special leave of that court only.

Yet, in India, its Supreme Court, despite art. 136, is ordinarily unwilling to interfere with orders granting or refusing bail by the High Court as it has considered that these are matters where it should be treated as final at the High Court. See *Iyer's Law of Bails*, 4th Edn (1988), at p. 254:

> 91. Practice of Supreme Court. – The Supreme Court does not ordinarily, in the exercise of its discretion under Art. 136, entertain petitions for special leave to appeal against orders granting or refusing or cancelling bail or anticipatory bail. These are matters where the High Court should become final and the Supreme Court should not entertain petition for appeal leave.
>
> Ordinarily, the Supreme Court is loath to interfere with orders granting or refusing bail but it cannot be an insurmountable obstacle in the way of rectifying an order which tends to disclose miscarriage of justice (*Pokar Ram v. State of Rajasthan*, AIR [1985] SC 969).
>
> Normally the Supreme Court does not interfere with bail matters and the orders of the High Court are generally accepted to be final relating to grant o[r] the rejection of bail.

In *Bihar Legal Support Society, New Delhi v. Chief Justice of India*, AIR [1987] SC 38, the Indian Supreme Court (*P.N. Bhagwati CJ, Ranganath Misra, v. Khalid, G.L. Oza and M.M. Dutt JJ*) said, at 40, by P.N. Bhagwati CJ:

> The apex Court has evolved, as a matter of self-discipline certain norms to guide it in the exercise of its discretion in cases where special leave petition are filed against orders granting or refusing bail or anticipatory bail. These norms have to be articulated in order that the people may know as to what is the judicial policy of the apex Court in entertaining such special leave petitions. That would go a long way towards introducing a measure of certainty in judicial response to such special leave petitions and would also tend to reduce the inflow of such special leave petitions. This was the reason why a Bench of this Court consisting of two of us, *viz*., the Chief Justice and Justice Rangannath Misra, clearly enunciated in an Order made on 30th October, 1985, in Special Leave Petition (Criminal) No. 2938 of 1985, that this Court should not "interfere with the orders granting or refusing bail or anticipatory bail" and that "these are matters in which the High Court should normally become the final authority". We reiterate this policy principle laid down by the Bench of this Court and hold that this Court should not ordinarily, save in exceptional cases, interfere with orders granting or refusing bail or anticipatory bail, because these are matters in which the High Court should normally be the final arbiter.

See also *Bail, Law and Practice* by M.R. Mallick (1990), at pp. 187, 188, where the learned author has put it succinctly, thus:

> 3. Grant or refusal of bail by High Court or other court and interference by Supreme Court

The Supreme Court has clearly observed that under Art. 136 of the Constitution the Supreme Court generally does not interfere, except in exceptional circumstances with the grant or refusal of bail by High Court. P.N. Bhagawati C.J. in *Bihar Legal Support Society v. Chief Justice of India* A.I.R. 1987 S.C. 38, has observed that the Supreme Court has evolved as a matter of self-discipline certain norms to guide it in the exercise of its discretion in cases where special leave petitions are filed against order granting or refusing bail or anticipatory bail, that these norms have to be articulated in order that the people may know as to what is the judicial policy of the apex court in entertaining such special leave petitions and that would go a long way towards introducing a measure of certainty in judicial response to such special leave petitions and would also tend to reduce the inflow of such special leave petitions. The following observation of the learned judge reads thus:

> This was the reason why a Bench of this court consisting two of us *viz.*, the Chief Justice and Justice Ranganath Misra, clearly enunciated in an order made on 30.10.85 in special leave petition (Criminal) No. 2938 of 1985 that this court should not "interfere with the orders granting or refusing bail or anticipatory bail", and that "these are matters in which the High Court should normally become the final authority". We reiterate, this is also the principle laid down by the Bench of this court and hold that this court should not ordinarily, save in exceptional cases interfere with the orders granting or refusing bail or anticipatory bail, because these are matters in which the High Court should normally be the final arbiter.

On the other hand, in this country we have never had any judicial policy such as that of the Indian Supreme Court which has laid down the rule that the High Court should normally be the final authority when it comes to granting or refusing bail.

The reason for such a judicial policy to exist in India is that the Supreme Court of India does not consider itself as a regular court of appeal. It declares that it will "interfere only in the limited class of cases where there is a substantial question of law involved which needs to be finally laid at rest by the apex court for the entire country or where there is grave, blatant and atrocious miscarriage of justice." This is how it was put by Bhagwati CJ in *Bihar Legal Support Society, New Delhi v. CJ of India, supra,* at 39, 40:

> It may, however, be pointed out that this Court was never intended to be a regular Court of appeal against orders made by the High Court or the Sessions Court or the Magistrates. It was created as an apex Court for the purpose of laying down the law for the entire country and extraordinary jurisdiction for granting special leave was conferred upon it under Art. 136 of the Constitution so that it could interfere whenever it found that law was not correctly enunciated by the lower Courts or tribunals and it was necessary to pronounce

> the correct law on the subject. This extraordinary jurisdiction could also be availed by the apex Court for the purpose of correcting grave miscarriage of justice, but such cases would be exceptional by their very nature. It is not every case where the apex Court finds that some injustice has been done that it would grant special leave and interfere. That would be converting the apex Court into a regular Court of appeal and moreover, by so doing, the apex Court would soon be reduced to a position where it will find itself unable to remedy any injustice at all on account of the tremendous backlog of cases which is bound to accumulate. We must realise that in the vast majority of cases the High Courts must become final even if they are wrong. The apex Court can also be wrong on occasions but since there is no further appeal, what the apex Court says is final. That is why one American judge said of the Supreme Court of the United States: "We are right because we are final: we are not final because we are right". We must, therefore, reconcile ourselves to the idea that like the apex Court which may be wrong on occasions, the High Court may also be wrong and it is not every error of the High Court which the apex Court can possibly correct. ... the apex Court must interfere only in the limited class of cases where there is a substantial question of law involved which needs to be finally laid at rest by the apex Court for the entire country or where there is grave, blatant and atrocious miscarriage of justice. Sometime, we judges feel that when a case comes before us and we find that injustice has been done, how can we shut our eyes to it. But the answer to this anguished query is that the judges of the apex Court may not shut their eyes to injustice but they must equally not keep their eyes too wide open, otherwise the apex Court would not be able to perform the high and noble role which it was intended to perform according to the faith of the Constitution makers. It is for this reason that the apex Court has evolved, as a matter of self-discipline, certain norms to guide it in the exercise of its discretion in cases where special leave petition are filed against orders granting or refusing bail or anticipatory bail.

On the other hand, in this country our appellate courts have always regarded themselves as regular courts of appeal. Indeed, before the 1998 amendment to the meaning of "decision" in s. 3 of the Courts of Judicature Act, appeals from the High Court to the former Federal Court and the then Supreme Court on bail matters have been common place, at least for the Public Prosecutor (see, for example, *PP v. Chew Siew Luan* [1982] 1 CLJ 354; [1982] 2 MLJ 119, FC, *PP v. Zulkifflee* [1990] 2 CLJ 1; [1990] 2 MLJ 215, SC, *PP v. Dato' Mat* [1991] 2 CLJ 1112; [1991] 2 MLJ 186, SC, *PP v. Leong Ying Ming* [1993] 2 CLJ 143; [1993] 1 MLJ 177, SC). The reason why there was no decision in the law reports of appeals from the High Court to the former Federal Court and the then Supreme Court from orders refusing to grant bail was that most of the criminal cases had originated from the subordinate courts and on appeal would end up in the High Court as the final court. There was only a handful of cases where accused persons have been tried initially at the High Court in the exercise of its original jurisdiction. One was a murder case

(*PP v. Mokhtar Hashim,* reported as *Mokhtar Hashim v. PP* [1983] 2 MLJ 232) where bail would be disallowed in the ordinary way. In all the other cases where the High Court was the trial court bail had been allowed. The instant appeal is the first appeal against a refusal of bail by the High Court (as the court of trial) to the Court of Appeal.

But, after the amendment to s. 3 on the meaning of "decision" by Amendment Act A 1031 of 1998, this court has held recently (*Saad Abas & Anor. v. PP* [1998] 4 CLJ 575) that criminal appeals from any decision of the High Court to the Court of Appeal are to be restricted only to decisions which would have the effect of finally determining the rights of the parties. This is how it was put by my lord, Lamin Mohd Yunus PCA, at 587:

> Now we may recall section 50(2) of the Courts of Judicature Act 1964, it employs the word "decision" which is defined in section 3. Early this year by Amendment Act A 1031 of 1998, that definition was amended to read:
>
> > "decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.
> >
> > So, for the purpose of section 50(2), this Court has first to ascertain whether the "decision" of the High Court in ordering the applicants before us to enter on their defence was a ruling that had the effect of finally disposing of their rights. Certainly not and it would only happen after a decision had been made at the close of the defence.

So that the question in the instant appeal is: Is the order of the High Court as the court of first instance refusing bail appealable to the Court of Appeal in the present case? The answer will depend on whether the order refusing bail to the appellant is a "ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties." If the bail was refused during the process of the appellant's trial, then, it is not appealable as such refusal would not have the effect of finally determining his rights.

In *Babu Singh v. State, AIR* [1978] SC 527, the Supreme Court of India has held that even if a previous application for bail was rejected by the Supreme Court, a fresh application for bail can be moved to the same court if new circumstances or developments arise for the applicants to apply for bail again. This is what the Indian Supreme Court (V.R. Krishna Iyer and D.A. Desai, JJ) said, at 528, by V.R. Krishna Iyer J:

> 2. Briefly we will state the facts pertinent to the present petition and prayer and proceed thereafter to ratiocinate on the relevant criteria in considering the interlocutory relief of bail. Right at the beginning we must mention that, at an earlier stage, their application for bail was rejected by this Court on September

> 7, 1977. But an order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, further developments and different considerations. While we surely must set store by this circumstance, we cannot accede to the faint plea that we are barred from second consideration at a later stage. An interim direction is not a conclusive adjudication, and updated reconsideration is not overturning an earlier negation. In this view, we entertain the application and evaluate the merits pro and con.

In *Babu Singh* the Indian Supreme Court has clearly laid down the principle that an order refusing bail does not bar another application for bail on a later occasion.

In *Babu Singh* all the six appellants were acquitted by the Sessions Judge for the offence of murder. On appeal against the acquittal the High Court convicted the appellants and sentenced them to life imprisonment. Pending their appeal to the Supreme Court five of the appellants applied to that court for bail. After their first application for bail was rejected by the Supreme Court, they applied again to the Supreme Court for bail six months later and this time the Supreme Court released them on bail.

Babu Singh is not a case of an appeal from the High Court to the Supreme Court against a refusal of bail by the High Court but the judgment is useful for the purpose of the present case as it goes to show that the grant or refusal of bail is actually a ruling made in the course of a trial or hearing of any cause or matter which does not finally determine the rights of the parties. As such, the grant or refusal of bail is not a "decision" within the meaning of that word in s. 3 of the Courts of Judicature Act as it applies today because such a decision (ruling) does not have the effect of finally determining the rights of the parties.

A decision made pending the trial of the charges against the appellant is not, in our considered opinion, a decision (ruling) that had the effect of finally determining the rights of the appellant. It is only the outcome of the trial that would have the effect of finally disposing of his rights. A decision on bail (by the court of first instance), whether the grant or refusal of it, will not finally determine the rights of the appellant in the outcome of his trial. That being so, the order of the High Court in refusing to admit the appellant to bail is not appealable to the Court of Appeal.

On the merits of the appeal, however, since we have allowed counsel to argue strenuously on them before us, we think that it is only right for us to say a few words. We find that there is only one ground of substance in the appellant's appeal and it concerns the question of the danger of witnesses being tampered with by an accused person. The judge below had relied on *PP v. Wee Swee Siang* [1948] MLJ 114 where this passage from the judgment of Callow J (at 115) was cited by him with approval. Callow J said, at 115:

a On the other hand the learned Deputy Public Prosecutor spoke of the likelihood of interference with prosecution witnesses, and that is a strong reason. At page 969 of *Sohoni's Code of Criminal Procedure* it states:

> Any allegation that the accused is tampering or attempting to tamper with evidence would be a cogent ground for refusing bail.

b Here the allegation made before and accepted by the learned district judge is that there was good reason to expect interference with witnesses.

That quotation from *Sohoni* could give the impression that any allegation of tampering without any material to support it will suffice.

c It is most regrettable that the judge below in the year 1998 had to resort to a fifty year old edition of *Sohoni* (which was relied on by Callow J in 1948) without realising that the editors of this well known textbook had already revised the book and its views in subsequent editions. The latest edition of *Sohoni's The Code of Criminal Procedure,* 19th Edn (1997) reads, at p. 4795:

d

> Where allegations are made that the accused might abscond or tamper with evidence or the like, bail will not be refused merely on the basis of vague allegations. There must be material on record which may give indication of such a possibility (*State of Maharashtra v. Nainmul Punjaji Shah* [1970] 1 SCWR 37).

e And at p. 4797:

> Courts have repeatedly pointed out that a vague and general allegation that the accused would tamper with the evidence is not a sound reason for refusing bail.

f See *Ingley and others v. Emperor,* AIR [1944] Nagpur 149 where the headnote reads, at 150:

> A vague and general allegation that the accused would tamper with evidence is not a sound reason for refusing bail: AIR 1930 Bom. 484.

g Niyogi J, at 150, put it thus:

> The bail was refused in the two courts below on the ground that some Government servants were suspected to be acting in league with Ingley and that further investigation on that line was in progress and that the applicants
h if enlarged on bail were likely to abuse their liberty by tampering with the evidence and suborning the witnesses.

and the judge concluded thus, at 151:

> As regards the fear of tampering with the evidence and suborning of witnesses,
i there is nothing but a vague and general allegation which is not a sound reason for refusing bail: see AIR 1930 Bom. 484.

And in *Guru v. Emperor,* AIR [1930] Bombay 484, the headnote reads:

> When the allegations against a prisoner are of a vague and general character and are not better defined or substantiated, they are not sufficient ground for refusing an application to enlarge a prisoner on bail: A.I.R. 1926 Rang. 51 and A.I.R. 1927 Rang. 205 (F.B.), Foll.

Mirza J said, at 485, 486:

> The Sessions Judge proceeds to state:
>
> > It is still urged by the learned Public Prosecutor and I consider with some justification, that if the accused are released on bail the evidence is likely to be tampered with. I do not think that this is a fit case for allowing bail to the accused.
>
> When the application first came before us on 10th April we allowed it to stand over to enable the Government Pleader to ascertain from those instructing him as to the exact nature of the apprehension on the part of the Public Prosecutor that if the accused is released on bail he is likely to tamper with the prosecution evidence. Sayad Usman Dagdoo, the Sub-Inspector of Police in charge of the investigations, has now made an affidavit in which he sets out the following grounds. He states that in the course of investigations, it has come to his knowledge that the applicant's co-accused, one Jaibai Karale, had pledged a gold ornament with the applicant and the same cannot now be traced. He apprehends that if the applicant is let out on bail it would be difficult for the prosecution to trace the ornament. He says in his affidavit that the applicant is a wealthy and influential man in Poona and if he is let out on bail he might win over the witnesses for the prosecution. He further alleges that a sum of Rs. 2,676 in respect of the price of certain milk supplied to the Sassoon Hospital, instead of being paid to one Mulik who was the milk contractor at the time, was paid to one Mahadu Martand who was a peon in the Sasson Hospital and was attached at the time to the applicant who was the Hospital Steward. The Sub-Inspector states that if the applicant is freed from custody the peon Martand may not possess courage enough to say what he knows against the applicant.
>
> With regard to the first one of these allegations the prosecution have not been able so far to trace the ornament which they allege was pledged with the applicant by his co-accused Jaibai. It is not clear how they would be hindred *(sic)* in tracing it if the applicant is let out on bail. The second allegation, *viz.* that the applicant is a wealthy and influential man in Poona and is therefore likely to win over the prosecution witnesses does not appear to us to be sufficiently cogent or convincing. It is common ground that there is no previous conviction against the applicant and that he has retired from Government service on a pension of Rs. 100 per month. We have no materials before us which would show that the applicant is a man of bad character or is likely to intimidate or otherwise win over the prosecution witnesses to his side. With

regard to the third allegation it is shown that the applicant retired from his post of steward in the Sasson Hospital two years ago and the peon Mahadu Martand has since continued in Government employment in the Hospital. There is no sufficient reason for us to suppose that Mahadu Martand would be under the influence of the applicant when he comes out on bail and would not be forthcoming to give true evidence against him at the trial. It is stated before us that Mahadu Martand has already made a statement before the police as to what he knows with regard to these alleged offences.

The principle on which the courts act in refusing bail in such matters is stated by Doyle, J., in *Mohammed Eusoof v. King-Emperor*, A.I.R. 1926 Rang. 51, as follows, at 53:

> Again, while mere vague allegations that the prisoner, if released, will tutor witnesses should not be taken into account, the Magistrate may well refuse to enlarge on bail where the prisoner is of such a character that his presence at large will intimidate witnesses, or where there are reasonable grounds for believing that he will use his liberty to suborn evidence.

Those remarks were endorsed by Sir Guy Rutledge, CJ, in the Full Bench case of *Emperor v. Nga San Htwa*, A.I.R. 1927 Rang. 205. In the case before us the allegations on which the learned Sessions Judge has acted in cancelling the applicant's bail appear to us to be of a vague and general character and they have not been better defined or substantiated since. In our opinion this is a fit case in which we should, in the exercise of our jurisdiction, set aside the order of the Sessions Judge and restore that of the City Magistrate, Poona.

Another case which *Sohoni* also relies on is *Emperor v. Abhairaj Kunwar*, AIR [1940] Oudh 8. This case has an uncanny resemblance to the overtones of the present case. The facts as related by Thomas CJ speak for themselves. The judge said, at 10:

> It has been strongly contended on behalf of the Crown that the accused (Rani Abhairaj Kunwar hereafter called Raj Mata) if released, will tamper with the evidence of the prosecution witnesses.

Thomas CJ continued, at 11, 12:

> The case for the prosecution is that Afaq Ahmad, accused, was the manager of Kunwar Sahib (Raj Mata's husband), a fact which is not admitted by Mr. Haider Husain (of counsel). The witness (PW22 who is the motor driver of Munni prostitute) has made a very lengthy statement in support of the prosecution case. He has supported the case for the prosecution to the fullest extent. The filing of the application on account of the pressure brought by Afaq Ahmad may or may not be true, and I am certainly not prepared to decide that point. The pressure, if brought, was by Afaq Ahmad and his friends who were in the service of the Raja. The witness does not suggest anywhere in his statement that this was done at the instigation of the Raj Mata or Kunwar Sahib.

The next witness is PW23, Hasan Mohammad Khan, who is a history sheeter and under police surveillance. This witness has stated in his statement that one Mohipal Singh and Puttu Singh threatened him and asked not to give evidence. The witness in spite of the threat has given evidence and supported the case for the prosecution. There again we have nothing on record to show that the present accused were responsible in any way, if the statement of the witness with regard to the threat is believed. The last witness is PW46, Sanwle. This witness certainly has resiled from his statement made before the police. The learned Magistrate treated him as hostile and allowed the prosecution to cross-examine him. There again there is absolutely no material before me, nor has any been pointed out by the prosecution, to show that the witness has altered his statement on account of the pressure or threat given by Kunwar Sahib or the Raj Mata. As I have said, Afaq Ahmad, if it is true that he was the manager of the estate, will naturally have the support of the servants of the Raja, and some of them in their zeal to support him may have done this, but I express no opinion one way or the other as the truth or falsehood of this statement. The learned Government Advocate has invited my attention to paragraph 9 of the second affidavit filed on 25th August 1939, which is as follows:

> That the deponent has received information that Rani Subhadra Devi and her manager, Jagannath Gupta, were threatened on telephone on 16th August 1939, at about 11pm, by an unknown person that they would be cut into pieces if they did not get the case against the Raja and Raj Mata dismissed. A report of the incident was made by the manager at the P.S. Hazratganj immediately, and the Superintendent of Police, Lucknow, had to make arrangements for their safety.

Kunwar Sahib was admittedly in jail on 16th August 1939, and the Raj Mata was released by the learned Sessions Judge on bail on the 16th. The orders I am informed were passed at 4.30pm, and she did not get out of the jail till 6.30pm. It is clear that the threat could not have been given by Kunwar Sahib himself. In any case it is not for me to decide the truth or falsehood of the allegations contained in para. 9 of the affidavit which are strongly denied by Mr. Haider Husain. Any interested person on behalf of either party can phone and utter the words which are alleged in this para. The mere use of the words "if they did not get the case against the Raja and Raj Mata dismissed" in my opinion do not convey anything. It is also stated by the learned Government Advocate that certain accounts have been discovered from a box belonging to the Raj Mata which show that a sum of Rs. 550 was paid to one Chatterji. The contention is that Mr. Chatterji, who is an advocate and is appearing on behalf of Punnu Khan, was paid this amount as his fees in the case for defending the accused. It must be remembered that the name of the Raj Mata was mentioned by the approver in his statement of 17th June 1939. She naturally was anxious, and if she did pay this amount to defend the accused, I personally see no harm in doing that, but this does not mean that she is tampering with the evidence of the prosecution witnesses. I have given serious consideration to the case and I have heard lengthy arguments for nearly two days and I am satisfied that so far no case of tempering with the prosecution evidence by Kunwar Sahib or the Raj Mata has been made out.

> All the important witnesses for the prosecution have already been examined and if they are witnesses of the type who are prepared to change their statements on receipt of a few hundred rupees, they will do so whether Raj Mata and Kunwar Shahib are on bail or are in the lock-up. If the accused are in the lock-up there is no doubt that they have got a host of people looking after the case who are just as capable of tampering with the evidence as the accused themselves. It is my duty to see that both sides are not hampered. I must see that the Crown does not get a free hand and the accused are locked up or are hampered in their defence simply on the ground that it is alleged or feared that they will tamper with the evidence. If I had been satisfied that they would tamper with the evidence, I would have been the last person to grant bail in a case of this nature. Mr. Haider Husain on behalf of the accused has strongly urged that if they are sent to jail they will not be able to defend the case or arrange for money for their defence. The complainant, Rani Subhadra Devi, her father and brother who remain to be examined in the case, certainly cannot be tampered with by the accused persons, and if there are any other witnesses they are only formal. There is no suggestion on behalf of the Crown that they will abscond.

See also *Paras Ram v. The State,* AIR [1951] Himachal Pradesh 13. Bannerji JC said, at 15:

> It is the duty of this court to see that the "State" does not get a free hand and the petitioner is locked up or hampered in his defence, simply on the ground that it is alleged or feared that the accused-petitioner, if enlarged on bail, will very likely tamper with the evidence.

And *Subbarama Iyer v. State,* AIR 1953 Travancore-Cochin 25. Koshi CJ said, at 26:

> (4) The reasons for the learned Judge's refusal to admit the applicant to bail is based on the apprehension that if enlarged he will tamper with the prosecution evidence. This is the usual slogan which the prosecution raises in opposing bail application and in this case there is no material whatever before me to show that there is any substance behind that apprehension. The State has not chosen to file an affidavit before this court to show that the applicant is an influential person or he is of a desperate character to influence or intimidate witness. Before me there is only the *'ipse dixit'* of the learned Public Prosecutor that the accused would if enlarged on bail tamper with the evidence. It does not appear that there was before the learned Sessions Judge either any material to substantiate the apprehension raised on behalf of the prosecution. Courts have repeatedly pointed out that a vague and general allegation that the accused would tamper with the evidence is not a sound reason for refusing bail. See *D.R. Guru v. Emperor,* AIR 1930 Bom. 484, *Emperor v. Abhairaj Kunwar,* AIR 1944 Nag 149.

The above cases have repeatedly emphasised that a vague and general allegation that the accused, if released, will suborn or intimidate witnesses or tamper with the evidence or try to obtain false evidence in support of his defence, is not a sound reason for refusing bail. Such an allegation is nothing more than the usual slogan which the prosecution raises in opposing bail. There must be some material put before the court to substantiate the apprehension raised on behalf of the prosecution. Bail is not to be refused merely on the basis of allegations about it. Even the tampering of evidence or intimidation of witnesses by others (unless it could be shown that this was done at the instigation or with the connivance of the accused) is no indication of the possibility that the accused himself would do so (*Emperor v. Abhairaj Kunwar,* AIR 1940 Oudh 8).

After having stated the principles on which a court will act in refusing bail on matters which concern the danger of witnesses being tampered with, the next step for this court to consider is whether this court should interfere with the exercise of discretion in refusing bail by the court below. Ordinarily, an appellate court will not interfere with the discretion exercised by lower court on a matter relating to bail. We refer to Goulding J in *Re Reed (a debtor)* [1979] 2 All ER 22, which we think is apposite although the case is not on a matter relating to bail. This is what the judge said, at 25:

> ... the duties of an appellate court in such a matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has applied a wrong principle, or has taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at.

We are not justified in interfering with the discretion exercised by the judge below simply because we may think we might have come to a different conclusion ourselves on similar material. That would be substituting our discretion for that of the judge below, and that we cannot do.

Was there, then, any material for the court below to exercise its discretion? In the present case, the court below was informed by the tendering of some police reports in court. Such a method of informing the court of the material for refusing bail has been done in *Re KS Menon* [1946] MLJ 49.

We are unable (as the police reports are not before us) to see if those police reports contained merely vague and general allegations, or, that those reports were in fact the first information report or complaint made which would

indicate with sufficient exactness the nature of the evidence that is likely to be produced which would implicate the appellant (see *Bail in Singapore* by S. Chandra Mohan, at p. 86).

Since we could not express any opinion on the sufficiency of those police reports as we have not seen them, we cannot in this appeal say that the judge had acted improperly when he refused to grant bail. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co. v. Johnston* [1942] AC 130).

The Privy Council in *Ratnam v. Cumarasamy* [1965] MLJ 228, 229 has held that the principles upon which an appellate court will act in reviewing the discretion exercised by a lower court are well settled. The court will not interfere unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or there has been a miscarriage of justice (*Evans v. Bartlam* [1937] AC 473).

However, as a result of the conclusion that we have already reached that any order made after 30 July 1998 for the grant or refusal of bail by the High Court is not appealable to the Court of Appeal, the appeal is therefore incompetent and we are constrained to dismiss it.

Perhaps, at this point, it is expedient for us to add a rider. Since, as of 31 July 1998, no appeal lies to the Court of Appeal from a decision of the High Court on a bail application, everything now will have to depend on the judicial conscience of a single judge of the High Court who is to exercise his discretion, not in opposition to, but in accordance with, established principles of law. But, what is there to stop a renegade judge from knowingly misusing his discretion by exercising it in opposition to established principles of law? Sadly, there is nothing that can be done under the law to correct such a miscarriage of justice! We all know the famous aphorism of the historian Lord Acton (First Baron Acton 1834-1902): "Power tends to corrupt, and absolute power corrupts absolutely." – *Letter in Life of Mandell Creighton*. Or, we can solace ourselves with the confident optimism of Lord Denning who says, "Someone must be trusted. Let it be the judges." (Lord Denning *What Next in the Law*, at p. 330). This is how Lord Denning puts it (at p. 330):

> There remains the most touchy question of all. May not the judges themselves sometimes abuse or misuse their power? It is their duty to administer and apply the law of the land. If they should divert it or depart from it – and do so knowingly – they themselves would be guilty of a misuse of power. So we come up against Juvenal's question, *'Sed quis custodiet ipsos custodes?'* (But who is to guard the guards themselves?)' That question was asked in the United States at the time of President Roosevelt's New Deal in 1935. It may be asked here again before long. In theory the judges of the higher echelon are appointed

by Her Majesty the Queen: but in practice by the Prime Minister, who in turn looks to the Lord Chancellor. Suppose a future Prime Minister should seek to pack the Bench with judges of his own extreme political colour. Would they be tools in his hands? To that I answer 'No'. Every judge on his appointment discards all politics and all prejudices. You need have no fear. The judges of England have always in the past – and always will – be vigilant in guarding our freedoms. Someone must be trusted. Let it be the judges.